quality of the LEC's element is the same or better.[4] By establishing this bright line test or some variation of it, incumbent LECs will have more difficulty challenging Section 251(d)(2)(B) issues where such a challenge is interposed primarily for delay or to raise the other party's costs.

IV. In Determining Whether To Unbundle A Network Element, The Commission Should Consider Factors In Addition To Those Listed In Section 251(d)(2)

In determining whether to unbundle a network element, the Commission unquestionably has the right to consider factors in addition to those listed in section 251(d)(2). Section 251(d)(2) expressly provides that the Commission should consider "at a minimum" the two factors listed in subsections (A) and (B). Moreover, Congress could have — but did not — require that if the Commission finds that if either or both of the factors listed favor denial of access, the Commission must reach such a finding. Rather, section 251(d)(2) simply requires the Commission to "consider" at a minimum those two factors listed.

One of the additional factors the Commission should consider is the impact on competition from a denial of access. While the factors listed may be relevant to the impact on competition, they often will not tell the whole story. Given that lengthy and costly adversarial proceedings could produce pyrrhic rather than real victories even if access is eventually obtained, the Commission also should consider the likely length of time before resolution of the proceeding and the likely costs that will be incurred in such a proceeding as well any other factors that may impact upon the ability of the party seeking access to compete.

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[4] If the incumbent LEC can establish that the bright line test is met, the party seeking access should still have the opportunity to show that its operations will be impaired if it does not receive the network element.

Another factor the Commission should consider is the harm -- or the lack thereof -- to the incumbent LEC if it is required to unbundle the network element. If the incumbent LEC will incur no harm, the Commission should be more willing to require unbundling.

V. The Commission Should Require The Incumbent LEC To Provide A Report As To The Dark Fiber It Has, And, If Applicable, To Prove It Lacks Any Dark Fiber

If the incumbent LEC denies owning or controlling the rights to any dark fiber in the relevant locations, it should have to prove its claim.[5/] As in the Advanced Telecommunications Capability proceeding (at ¶¶ 54 & 55) with respect to collocation issues, the Commission should require that within ten days of an incumbent LEC making a claim that it does not have dark fiber, it must provide the party wishing to access dark fiber with proof that the incumbent LEC's claim is accurate. At the very least such proof should consist of providing the party seeking access with all existing maps and documentation of any fiber the incumbent LEC owns or controls the rights to in the relevant area, as well as a detailed report explaining why each section of fiber is unavailable (e.g., currently leased for a term expiring in May 2004). If such maps or documentation are outdated, they should be updated during the ten day period before being provided to the party seeking access. In addition, to the extent feasible, the party seeking access should be able to perform its own inspections to verify the accuracy of the maps and documentation provided.

[5/] The incumbent LEC generally should not have the right to reserve the dark fiber for its own use.

The incumbent LECs' reporting requirements should not be limited to where they deny having dark fiber available. At any time, upon request from a party seeking access to dark fiber, the incumbent LEC should be obligated to provide the maps and documentation referred to above for the relevant area as well as a report detailing which fiber, if any, is available. This material should also be available on the incumbent LEC's Internet site.

VI. Installation of New Dark Fiber

Given that the installation of fiber is often far easier and less costly for incumbent LECs than for those seeking access, under certain circumstances the Commission should require incumbent LECs to install dark fiber at the expense of the party seeking installation. In determining whether requiring such installation is appropriate in a given circumstance, the Commission should consider the harm or inconvenience, if any, to the incumbent LEC in installing the fiber, the need for the dark fiber by the party requesting it, any available alternatives and the impact on competition if such fiber is not provided.

VII. No Sunset

Given the importance to competition of the rules that the Commission will adopt in this proceeding, such rules should not be eliminated without a Commission determination that they are no longer necessary. Instead, in three years the Commission should review the state of competition to determine whether the rules it adopts here are still necessary.

CONCLUSION

For the reasons set forth herein, the Commission should adopt rules consistent with the comments and proposals of CO Space.

RTE GROUP, INC.

By: Alan G. Fishel

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Its Attorney

Dated: May 26, 1999

CERTIFICATE OF SERVICE

The undersigned, being an attorney, does hereby certify that a true copy of the foregoing COMMENTS OF CO SPACE SERVICES, INC. TO THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING was sent via hand delivery on this 26th day of May, 1999, to the following parties:

Janice M. Myles (2 copies)
Common Carrier Bureau
FCC 445 12th Street, S.W.
Room 5-C327
Washington, D.C. 20554

ITS (1 copy)
1231 20th Street, N.W.
Washington, D.C. 20036

Alan G. Fishel

Alan G. Fishel

1999 U.S. Dist. LEXIS 2775 printed in FULL format.

ORIGINAL

MCI TELECOMMUNICATIONS CORP. and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., PLAINTIFFS, v. BELLSOUTH TELECOMMUNICATIONS, INC., KENTUCKY PUBLIC SERVICE COMMISSION, and LINDA BREATHITT, EDWARD J. HOLMES, B.J. HELTON, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONER OF THE KENTUCKY PUBLIC SERVICE COMMISSION, DEFENDANTS.

CIVIL ACTION NO. 97-76

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, FRANKFORT DIVISION

1999 U.S. Dist. LEXIS 2775

March 11, 1999, Decided
March 11, 1999, Filed

DISPOSITION: [*1] Court remanded the dark fiber issue to the PSC for the purpose of determining a non-discriminatory time-frame in which MCI required to use all dark fiber leased from BellSouth and a time frame in which BellSouth has a legitimate business purpose for withholding the lease of dark fiber for its own use and to the PSC for the determination of the appropriate wholesale rate of CSAs between the parties. Court overturned the PSC's decision to exclude from resale all short term promotions offered by BellSouth.

COUNSEL: For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Henry S. Alford, C. Hatfield, Middleton & Reutlinger, Louisville, KY.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Michelle B. Goodman, Jenner & Block, Washington, DC.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Donald B. Verrilli, Jr., Washington, DC.

For MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiff: Thomas F. O'Neil, III, William Single, IV, Matthew B. Pachman, MCI Telecommunication Corporation, Maureen F. Del Duca, Thomas J. Perrelli, Washington, DC.

For [*2] BELLSOUTH TELECOMMUNICATIONS, INC., defendant: Mark R. Overstreet, Bruce F. Clark, Stites & Harbison, Frankfort, KY.

For BELLSOUTH TELECOMMUNICATIONS, INC., defendant: Dorothy J. Chambers, Creighton E. Mershon, Sr., BellSouth Telecommunications, Inc., Louisville, KY.

For BELLSOUTH TELECOMMUNICATIONS, INC., defendant: Michael K. Kellogg, Sean A. Lev, Kellogg, Huber, Hanse, Todd & Evans, P.L.L.C., Washington, DC.

For BELLSOUTH TELECOMMUNICATIONS, INC., defendant: William Barfield, R. Douglas Lackey, Thomas B. Alexander, BellSouth Telecommunications, Atlanta, GA.

For KENTUCKY PUBLIC SERVICE COMMISSION, LINDA BREATHITT, EDWARD J. HOLMES, B. J. HELTON, defendants: Deborah Tully Eversole, Amy E. Dougherty, William L. Willis, Public Service Commission of Kentucky, Frankfort, KY.

JUDGES: JOSEPH M. HOOD, JUDGE.

OPINIONBY: JOSEPH M. HOOD

OPINION: MEMORANDUM OPINION AND ORDER

This matter is before the Court on a challenge by Plaintiffs MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI") of several aspects of an agreement between Plaintiffs and Defendant BellSouth Telecommunications, Inc. (hereinafter "BellSouth"). Said agreement [*3] was arbitrated by Defendant Kentucky Public Service Commission (hereinafter "PSC") pursuant to the local competition provisions of the Telecommunications Act of 1996, Pub. L. No. 104-401, 110 Stat. 56 (hereinafter the "Act" or "1996 Act"). Greatly dissatisfied with the outcome of said arbitration, MCI appears before this Court seeking relief.

MCI alleges that BellSouth failed to comply with the Act in that BellSouth continues to reap monopoly profits while preventing competitors such as MCI from effectively competing in local markets. Furthermore, MCI alleges that during arbitration, the PSC incorrectly interpreted the Act which resulted in an unfavorable decision against MCI in multiple portions of the agreement.

All parties to the above-styled action have filed briefs with this Court addressing the merits of their respective positions. On January 27, 1999, oral arguments were held before this Court. The parties were then given the opportunity to file supplemental briefs in support of their respective positions due to the fact that two days prior to oral arguments, the United States Supreme Court rendered an opinion in At&T Corp. v. Iowa Utilities Bd., U.S. , [*4] 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999), which concerns the 1996 Telecommunications Act. This Court has now been sufficiently advised and reaches the following findings of fact and conclusions of law.

FINDINGS OF FACT

The above-styled action turns on the interpretation of several provisions of the 1996 Telecommunications Act. Said Act was enacted for the purpose of opening up full and effective market competition for both local and long distance telephone service. In creating the Act, Congress recognized that new entrants into a telecommunications area would be disadvantaged when pitted against a long dominating incumbent local exchange carrier (hereinafter "ILEC").

Under the Act, Congress set forth three methods to facilitate entry into the market. The first method allows a new entrant to interconnect directly or indirectly with the facilities and the equipment of the ILEC, thus enabling a customer of the new entrant to make and receive calls from the ILEC's customers. See 47 U.S.C. @ 251(a)(1). The second method of entry permits new entrants to purchase their retail services at wholesale rates so that new entrants can compete by reselling these services under a different brand to retail [*5] customers. Finally, Congress provided new entrants with a method whereby they may lease on an element by element basis, portions of the ILEC's existing local network.

Under the Act, new entrants are to request and negotiate interconnection from an ILEC. If the ILEC and the new entrant cannot agree on the terms in which the new entrant enters the market, the state utility commission has the authority to arbitrate under federal law all disputed issues. If the state public utility commission is unable to perform this duty, the Federal Communications Commission is to step in and arbitrate the matter. The arbitration process results in an interconnection agreement incorporating both negotiated and adjudicated terms. Said agreement must be finalized within nine months from the time a new entrant first requests negotiations. See 47 U.S.C. @ 252(b)(4)(C).

In the case at bar, MCI first requested interconnection from BellSouth, an ILEC, on March 26, 1996. Said parties could not agree on the manner of market entry and the PSC was petitioned for arbitration by MCI on September 3, 1996. According to the nine month rule, the PSC was required to make a final determination on all issues by [*6] December 26, 1996.

The PSC investigated the issues raised in MCI's petition and BellSouth's response, including the key issues of costs and rates. It also conducted discovery, held hearings on November 7 and 8, 1996, and issued an order on December 20, 1996. In the PSC's order, BellSouth was required to file studies of certain discrete costs which were not in the record so that final rates on those few items could be set pursuant to principles described in the order. Additionally, MCI and BellSouth were ordered to file their interconnection agreement within sixty days.

Instead of filing the interconnection agreement within the deadline set by the PSC, the parties filed with the PSC petitions for reconsideration and clarification. In addition, MCI asked for an establishment of a separate, additional docket to consider costs and rates, which are essential terms of an interconnection agreement. Because the appropriate methodology to determine those rates had already been decided, the PSC refused to establish an additional docket.

In an attempt to work out an interconnection agreement, the PSC entertained an additional list of issues filed by MCI on February 24, 1997, and made determinations [*7] regarding additional disputes between the parties. However, the PSC refused to establish an additional docket to reconsider costs and rates for interconnection. The PSC did set a hearing for June 10, 1997 to consider additional cost studies filed by BellSouth as required by the December 20, 1996. To encourage settlement, the PSC scheduled an informal conference to clarify costs issues and expedite final matters. n1

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n1 AT&T was invited to attend this informal conference due to the fact that it, too, was negotiating an interconnection agreement with BellSouth.

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At the informal conference, MCI was unprepared to discuss the specific cost issues which were the subject at hand, and asked for additional time in which to discuss and present same. Again, MCI requested that an additional docket begin from ground zero to reevaluate BellSouth's costs upon which interconnection rates were to be based.

Determining that MCI had no interest in a meaningful participation in any procedure short of an additional full-blown cost [*8] docket to review interconnection rates, the PSC canceled its June 10, 1999 hearing and set final interconnection rates based on methodologies it had determined pursuant to evidence presented during the statutory time frame. On June 4, 1997, MCI once again requested an additional docket to reevaluate BellSouth's costs. Said request was denied by the PSC and the parties were ordered to finalize and submit their agreement.

On August 4, 1997, MCI filed a motion for a rehearing and reconsideration based on deprivation of its constitutional right to due process. Said motion was eventually denied by the PSC. n2 Finally, on August 13, 1997, MCI and BellSouth filed an executed interconnection agreement which was approved by the PSC pursuant to 47 U.S.C. @ 252(e)(4).

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n2 AT&T filed a similar claim of denial of due process.

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Seeking relief from what it saw as a violation of the 1996 Telecommunications Act, MCI filed a complaint before this Court on September 22, 1997.

CONCLUSIONS OF LAW

In the aforementioned complaint, [*9] MCI presents six issues for resolution by this Court.

I. Calculation of Interconnection Rates

When forming the interconnection agreement, the new entrant and the ILEC must determine the value at which the telecommunication infrastructure is transferred to the new entrant. 47 U.S.C. @ 251(c)(3) requires the ILEC to provide to new entrants "nondiscriminatory access to network elements" in an unbundled form and in a manner that allows the new entrants to combine such elements in order to provide telecommunications service. This means that the ILEC sells or leases to the new entrant, equipment and supporting services at separate prices in a manner that allows the new entrant to provide services to telephone customers. See AT&T Corp. v. Iowa Utilities Bd., 142 L. Ed. 2d 834, 119 S. Ct. 721, 737 (1999).

Pursuant to 47 U.S.C. @ 252(c), the PSC has the authority during arbitration to "establish any rates of interconnection, services, or network elements" at issue between the parties. Said rates must be "just and reasonable." See id. at @ 252(d)(1). The PSC shall base these rates on the cost expended by the ILEC in establishing these network elements, and may include a reasonable [*10] profit earned by the ILEC. Id; See also 47 C.F.R. @ 51.505(a). Said cost must be "determined without reference to a rate-of-return or other rate-based proceeding" and instead should be a forward-looking economic cost. 47 U.S.C. @ 252(d)(1)(A). This total element long run incremental cost (hereinafter "TELRIC") of an unbundled network element is the "forward looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to" that element. 47 C.F.R. @ 51.505(b).

MCI argues that the PSC failed to properly calculate the rate at which BellSouth could charge for each unbundled network element (hereinafter "UNE").

These rates, according to MCI, are based on BellSouth's existing network configuration and embedded technology. Instead of using TELRIC pricing to figure the "cost of operating a hypothetical network built with the most efficient technology available" n3 as a base rate, MCI argues that the PSC figured into the rate BellSouth's bloated, inefficient infrastructure so BellSouth could undercut new competitors' prices in the short term in an attempt to retain its monopolistic grip [*11] on the market.

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n3 AT&T, 142 L. Ed. 2d 834, 119 S. Ct. 721, n.3 (defining the elements to be used in TELRIC pricing).

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According to the record, both MCI and BellSouth were given an opportunity to submit pricing schemes to the PSC. MCI's rates were based on the "Hatfield model", a computer model that has generated much criticism for failing to take into account the reasonable costs facing ILECs. n4 In AT&T Comm. of South Cent. States, Inc. v. BellSouth Telecomm., Inc., 20 F. Supp. 2d 1097 (E.D. Ky. 1998), a case strikingly similar to the one at bar, this Court noted that the Hatfield model was recognized as having numerous problems with its assumptions. BellSouth presented to the PSC a pricing scheme based on a nine-step analysis which the PSC has described as reflecting the concrete reality of operating its local exchange network.

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n4 Many PSCs in other states have held that the Hatfield model is unreliable and suffers from design flaws. See e.g., Opinion and Order, Petition of MCImetro Access Transmission Servs., Inc. for Arbitration of Its Interconnection Request to Bell Atlantic-PA, Inc., 1996 Pa. PUC LEXIS 169, at *18(Pa. PUC Dec. 20, 1996); Order, Consolidated Petitions of NYNEX, Teleport Comm. Group, Inc., etc, Pursuant to @ 252(b) of Telecommunications Act of 1996, D.P.U. 96-73/74 - Phase 4, @ IV.B.2 (Mass. Dept. of Pub. Utils. Dec. 4, 1996); Arbitration Order, AT&T Comm. of the Southwest, Inc. Petition for Arbitration with Southwestern Bell Tel. Co., No. TO-97-40, @ II, 1 (Mo. PSC Dec. 11, 1996).

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[*12]

Although the PSC relied for the most part on BellSouth's model to set the interconnection rates, the PSC states that it did not take BellSouth's rates at face value. Instead, the PSC adjusted BellSouth's rates largely through use of the Hatfield model and used the Hatfield model as an independent estimate to check the reasonableness of BellSouth's estimates. The PSC concluded that BellSouth's studies, particularly as adjusted, more closely reflected actual TELRIC costs than did the Hatfield model.

This Court will review de novo whether the PSC set the rates in the case at bar in a manner that violated the 1996 Act. n5 The facts before this Court on the pricing issue are almost identical to those in AT&T Comm. of South Central States, Inc. v. BellSouth Telecomm., Inc., 20 F. Supp. 2d 1097 (E.D. Ky. 1998). In AT&T, said party presented a pricing scheme based on the Hatfield model and BellSouth presented the same cost studies as it did in the case at bar. The

PSC rejected AT&T's cost studies due to the numerous problems that accompanied the Hatfield model. However, the PSC used AT&T's model "as an independent check on the reasonableness of BellSouth's studies." Id. at [*13] 1101. This Court held that the PSC was "within its discretion when it rejected" the Hatfield model. Id.

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n5 The Court notes that every court that has addressed the issue of whether an interpretation of federal law by a state commission such as the PSC should be given deference by a federal court has held that the commission's interpretations should be subject to de novo review. See e.g. AT&T, 20 F. Supp. 2d at 1100; AT&T Comm. of California v. Pacific-Bell, 1998 WL 246652 (N.D. Cal. May 11, 1996).

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As this Court has previously held, the "thoughtful resolution of an intensely factual issue" by the PSC will not be second guessed by this Court. Id. After MCI's request for arbitration on September 3, 1996, the PSC investigated the key issues of costs and rates, conducted discovery on the issues, and held hearings for two days in November of 1996. On December 20, 1996, the PSC issued a ruling on same. MCI repeatedly demanded that the PSC establish a separate additional docket to reconsider costs and rates. [*14] Said requests were denied. However, the PSC did set a hearing on June 10, 1997 to consider additional cost studies filed by BellSouth in response to the December 20, 1996 Order. At an informal conference held prior to the June 10th hearing, MCI was not prepared to discuss the specific costs issues with the PSC and instead asked that the hearing be canceled to give MCI additional time to prepare. Again MCI asked for an additional docket to reevaluate BellSouth's costs upon which interconnection rates were to be based.

The PSC felt that MCI had shown no interest in any type of meaningful participation in any procedure short of an entirely separate docket to reevaluate BellSouth's cost studies. Therefore, the PSC canceled the June 10, 1997 hearing and set final rates based on methodologies it had determined pursuant to evidence presented during the statutory time frame of March 1996 to December 1996.

Upon review of the record, this Court determines that the rates set by the PSC, which were based on BellSouth's cost studies in comparison with those presented by MCI, are indeed forward looking and comply with the 1996 Act. The Court will uphold as reasonable the PSC's conclusion that [*15] BellSouth's cost studies more closely reflected actual TELRIC costs than did the Hatfield model. The interconnection rates set by the PSC will not be disturbed by this Court.

Related to the issue of cost studies, MCI argues that the PSC's refusal to allow MCI an opportunity to present objections to the cost studies filed by BellSouth and used by the PSC to set the rates included in the interconnection agreement was a violation of MCI's Fourteenth Amendment right to due process. n6

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n6 MCI is entitled to assert a due process claim because it has an entitlement to the proper setting of telecommunication rates. See MCI Telecomm. v. BellSouth Telecomm., 9 F. Supp. 2d 766, 772 (E.D. Ky. 1998) (holding that a carrier has a property interest in telecommunication rates and therefore is entitled to due process in the calculation of said rates).

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"Due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. [*16] Ct. 2593 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1975)(quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). In determining the merit of MCI's due process claim, the Court will apply three factors. First, the Court will look at "the private interest that will be affected by the official action." Mathews, 424 U.S. at 335. Next, the Court will evaluate "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Id. Finally, the Court will look at the agency's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id.

At the time the PSC became involved in assisting the parties in forming the interconnection agreement, there were approximately three and a half months remaining in the nine-month rule. The PSC did an investigation, conducted discovery, and held hearings [*17] before it issued an order. The Court notes that both MCI and BellSouth participated in the submission of cost studies to the PSC and in the two-day hearings. After the December 20, 1996 order was issued and while the parties were finalizing their agreement, the PSC entertained motions from the parties and scheduled a hearing to consider additional cost studies which BellSouth was required to file pursuant to the aforementioned order. n7 That hearing was canceled due to MCI's lack of meaningful interest in participating in any procedure short of an additional full-blown cost docket to review the interconnection rates. Said lack of interest is obvious from MCI's multiple requests for an additional docket and petitions for reconsideration. Moreover, at an informal conference set prior to the hearing, MCI was unprepared to discuss the specific cost issues and requested that the PSC start from ground zero in reevaluating BellSouth's costs upon which the interconnection rates were to be based.

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n7 The PSC heard motions for an additional six months after it issued its December 20, 1996 order in an effort to assist the parties in finalizing their agreement.

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[*18]

In balancing the three interests formulated in Mathews against the statutory time frame set forth in the Act, this Court finds that the PSC did not violate MCI's due process rights. To reiterate a conclusion reached by this Court in AT&T, "requiring the PSC to conduct more hearings and entertain more arguments would undermine the clear intention of Congress to encourage the rapid deployment of new technology through competition and reduced regulation." AT&T, 20 F. Supp. 2d at 1102. Based on the circumstances before the PSC, MCI was provided with adequate procedural protections as the situation demanded. See Morrissey, 408 U.S. at 481.

MCI also takes issue with the PSC's refusal to geographically deaverage network element rates during its calculation. The concept of deaveraging establishes separate rates for different population density zones. MCI argues that the PSC should have computed the rates to reflect the geographic cost differences of providing network elements to MCI's new customers and required BellSouth to resell those services accordingly. n8

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n8 MCI notes that BellSouth's cost studies indicate that the deaveraged rate in urban areas would be 51 percent lower than the deaveraged rate in rural areas.

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[*19]

MCI basically argues that the PSC's failure to deaverage rates results in MCI paying prices for network elements that are wholly divorced from the forward-looking economic cost of providing those elements. According to MCI, the refusal to deaverage is contrary to the 1996 Act.

The PSC interpreted the Act to be silent on the issue of deaveraging. As a result, the PSC states that it carefully balanced universal service goals with the Act's mandate of fostering the rapid development of competition when establishing the cost-based UNE rates. It defends its decision not to deaverage at this early stage of competition by relying on the need to serve all customers and the fact that the Act explicitly provides that a company's rates to subscribers in rural and high cost areas may be no higher than its rates charged to urban subscribers. See 47 U.S.C. @ 254(g). The PSC does not dispute the fact that deaveraging will occur in the future; however, such action is not feasible at this point in time.

This Court agrees with the PSC that the Act appears to be silent on the issue of deaveraging. Therefore, the Court will focus on whether the PSC's refusal to consider deaveraging the cost of [*20] the UNEs is a violation of the spirit of the Act. The purpose of the Act is to create a vibrant competitive market that will bring lower prices and better service to consumers. A review of the legislative history indicates that the Act's objectives are to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid development of new telecommunications technologies." H. Rep. No. 104-204, 1 (July 24, 1995). In an effort to foster telecommunications growth and development in rural and high cost areas, the federal government subsidizes some of the universal service costs incurred by a telecommunications carrier. See 47 U.S.C. @ 254(b), (d).

The Court is aware from the cost studies provided by BellSouth that the expenses of providing local service varies with the density of the population. The Court is also aware that should the PSC geographically deaverage the cost of providing service to customers, the possibility exists that new entrants would only purchase UNEs in urban areas or other low cost segments of the industry. By purchasing UNEs in this manner, a new entrant [*21] could obtain the advantages of serving low overhead areas immediately without dealing with the need to subsidize the more expensive areas. The Court recognizes that remote rural areas which are less densely populated are not terribly attractive to new market entrants. However, their need for service at a reasonable rate is no less important than the need in booming urban areas. It is the opinion of this Court that the PSC's refusal to deaverage was an effort to prevent new entrants from seeking the lowest possible overhead to serve the most lucrative customers. The PSC must remain focused on the long term interests of the citizens of Kentucky. Therefore, the decision of the PSC to balance universal service goals with the purpose of the Act by refusing to deaverage the UNE rates was lawful.

II. Dark Fiber Usage

MCI alleges that the PSC discriminated against it in its ruling on the use of a UNE known as dark fiber, an unused fiber optic cable between switches in BellSouth's network. Said fiber is dark in the sense that the carrier has chosen not to provide the electronic equipment needed to power or "light" it.

The PSC ruled that BellSouth did not have to provide MCI with the [*22] opportunity to lease dark fiber if BellSouth had a legitimate business purpose for the fiber. Said purpose required use of the fiber within three years. If BellSouth did lease the dark fiber to MCI, MCI was required to make use of the fiber within six months or lose the lease. MCI claims that the two different time frames for the parties is discriminatory.

According to the PSC's ruling, anytime that MCI requests dark fiber, BellSouth is required to demonstrate on a case by case basis that BellSouth needs the fiber for its own use. The PSC felt that is was not unreasonable to permit BellSouth, the company that laid the fiber, to use it rather than sell it if it can demonstrate the need for it.

The issue of dark fiber is one of first impression for this Court. At this point in time, there is no binding precedent on whether or not dark fiber is indeed a UNE. However, several district court decisions discussed forthwith provide excellent guidance to this Court.

To begin this analysis, the Court will define dark fiber as a fiber optic cable which is used to transmit telecommunications after it becomes lit. The PSC has referred to it as unused transmission media and states that it is [*23] not a UNE because it has no electronics connected to it and does not function as part of the telephone network. Therefore, the PSC held that it does not contribute to a carrier's provision of service until after the carrier decides to electronically connect it to the existing lit optic fibers.

This Court disagrees with the PSC and finds that dark fiber is indeed a UNE. The FCC has held that dark fiber is "wire communication" under the predecessor to the 1996 Act. In re Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service, 8 FCC Rcd 2589 (F.C.C. 1993), remanded on other grounds, Southwestern Bell Tel. Co. v. F.C.C., 305 U.S. App. D.C. 272, 19 F.3d 1475 (D.C. Cir. 1994). This Court finds that dark fiber is a UNE because it is in the ground ready to go and in some cases wrapped around lit fibers that are classified as UNEs. Dark fiber in the ground is "less like inventory and more like a network element; that is, a 'facility or equipment used in the provision of a telecommunications service.'" MCI v. Bell-Atlantic, 1999 WL 77380, *4-5, 1999 U.S. Dist. LEXIS 1673, NO. CIV. 97-3076 (D.D.C. Feb. 17, 1999)(quoting 47 U.S.C. @ 251(c)(3)). [*24] Similarly, U.S. West Comm., Inc. v. AT&T Comm. of the Pac. Northwest, Inc., 31 F. Supp. 2d 839 (D. Or. 1998) has held that the ready-to-use quality of dark fiber coupled with sufficient evidence to support a new entrant's material impairment to the ability to properly interconnect without dark fiber indicates that said fiber is a UNE. Id. at 854; See also MCI Telecomm. v. BellSouth Telecomm., 7 F. Supp. 2d 674, 679-80 (E.D.N.C. 1998).

Upon de novo review, this Court concludes that dark fiber is a UNE. According to 47 U.S.C. @ 251(d)(2) and @ 253(c)(3), BellSouth must provide MCI with nondiscriminatory access to BellSouth's dark fiber if failure to provide such access would impair MCI's ability to provide the telecommunication service it seeks to offer to its customers. See MCI Telecomm., 7 F. Supp. 2d at 680. The PSC states that even if this Court concludes that dark fiber is a UNE, its decision need not be overturned because MCI's ability to provide service would not be impaired. This Court is not convinced that MCI would not be impaired under the dark fiber scheme established during arbitration and therefore remands this issue to the PSC. The Court notes that the [*25] PSC's decision to require MCI to use any dark fiber leased from BellSouth within six months is reasonable as it ensures that dark fiber is allocated first to those carriers with the greatest need. However, permitting BellSouth to retain dark fiber for three years before lighting it, even if BellSouth has legitimate business decision, seems to be unreasonably restrictive on all new entrants.

III. Short Term Promotions and Contract Service Arrangements

The third issue MCI presents to this Court is two-fold. First, MCI alleges that BellSouth's exclusion of all short-term promotions from resale at a discount rate, an action permitted by the PSC, is contrary to the 1996 Act and FCC regulations. MCI states that the PSC's decision that BellSouth's short-term promotions, which are promotions that last for a period of 90 days or less, are not subject to resale hinders MCI's ability to compete through the resale process envisioned in 47 U.S.C. @ 254.

This Court determines de novo, that the PSC incorrectly ruled on this issue. The PSC's decision was much like that of the North Carolina Utilities Commission in MCI Telecommunications previously discussed by this Court. MCI Telecomm., [*26] 7 F. Supp. 2d 674. Both state commissions seem to have been under the impression that short-term promotions do not have to be made available to new entrants. This notion is clearly wrong. What the FCC has said is that an ILEC does not have to offer to the new entrants short term promotions at a discount rate. Instead, the ILEC "shall apply the wholesale discount rate to the ordinary rate for a retail service" only if "such promotions involve rates that will be in effect for no more than 90 days;" and the ILEC does not attempt to use the short term promotions as an attempt to evade other obligations under the Act. 47 C.F.R. @ 51.613(a)(2); See MCI Telecomm, 7 F. Supp. 2d at 682-83. An ILEC who refuses to market short-term promotions to a new entrant is in violation of @ 251(c)(4). Therefore, the PSC's decision to exclude from resale all short term promotions offered by BellSouth is overturned.

Second in this issue is whether the PSC's failure to require BellSouth to sell contract service arrangements (hereinafter "CSAs") to MCI at the wholesale rate violates the plain language of the Act and FCC regulations. CSAs are "contractual agreements made between a carrier and a specific, [*27] typically high volume customer, tailored to that customer's individual needs." AT&T Comm. of Southern States v. BellSouth Telecomm., 7 F. Supp. 2d 661, 671 (E.D.N.C. 1998)(internal cites omitted). This Court need not reach a conclusion on this matter as BellSouth has informed the Court that it is now willing to sell CSAs to MCI at a wholesale rate. n9 Therefore, this issue is remanded to the PSC to determine the appropriate wholesale rate for CSAs to be sold by BellSouth to MCI.

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n9 This change of heart by BellSouth came after the FCC made clear that it disagreed with the PSC and other state commissions on this issue. The FCC informed BellSouth that it would not grant BellSouth the authority to provide long distance service originating in any state in which it provides local service if such CSA restrictions exist in that state.

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IV. Customized Routing for Resale Customers

MCI disagrees with the PSC's decision to allow BellSouth to refuse to provide customized routing to new entrants providing service [*28] through resale. Customized routing would have meant that an MCI customer's call would be automatically routed to an MCI operator for operator service and directory assistance (hereinafter "OS/DA"), rather than to a BellSouth operator. Because this Court is making a determination as to whether the PSC's ruling on this issue is contrary to federal law, a de novo review is required.

MCI argues that the Act requires BellSouth to unbundle its OS/DA services from its resold local exchange service and offer them to new entrants to the extent it is technically feasible. BellSouth relies on 47 U.S.C. @ 251(c)(4)(A) which states than an ILEC's duty under the Act is to make available for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . . ." Because local exchange service without operator service is not provided by BellSouth to subscribers who are not telecommunication providers, BellSouth argues that the Act does not require it to offer unbundled OS/DA service to MCI.

This exact issue appeared before the Court in AT&T Comm. of the South Cen. States, Inc. v. BellSouth Comm., Inc., 20 F. Supp. 2d 1097 [*29] (E.D. Ky. 1998). It is this Court's ruling that the "FCC does not require an ILEC to unbundle its OS/DA from its resold services when it does not provide this for itself. Id. at 1103. By requiring BellSouth to unbundle its OS/DA from its service package sold to its own customers, the Court would be forcing BellSouth to provide for resale to MCI, a package that BellSouth does not even offer to its own customers. See id. This requirement would be contrary to @ 251(c)(4). Therefore, on the issue of customized routing, the PSC's decision will be upheld.

V. Access to Customer Service Records

MCI challenges the PSC's decisions regarding the manner in which it must obtain from BellSouth customer service records and payment histories, claiming that the procedures approved by the PSC violate the Act in that they are unreasonable and discriminatory. MCI is seeking real-time access to BellSouth's customer records in order to make an accurate price quotation on MCI's services, as many small business and residential customers are unaware or unable to recall all of the services to which they subscribe. BellSouth states that the information requested by MCI is customer proprietary [*30] network information (hereinafter "CPNI") and is therefore confidential under 47 U.S.C. @ 222(c). The PSC has held that BellSouth may deny said access unless BellSouth has received a letter of authorization from the customer, or a three-way call occurs between BellSouth, MCI, and the customer.

This issue is another of first impression for the Court. 47 U.S.C. @ 222(c) states as follows:

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

MCI urges this Court to find an exception in @ 222(d) which permits a telecommunications carrier to disclose CPNI obtained from the customers. Said subsection contains [*31] the following grounds for invoking the exceptions:

(1) to initiate, render, bill and collect for communications services;

(2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of or subscription to, such services; or

(3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.

47 U.S.C. @ 222(d).

The Court interprets the exceptions to the confidentiality rule to apply to carriers already possessing CPNI within the context of the existing service relationship, and not to carriers seeking access to CPNI. This was also the conclusion by the FCC in its Second Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecomm. Act of 1996: Telecomm. Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 13 FCC Rcd 8061, 8216 [P 84](1998). Furthermore, MCI does not with to obtain this CPNI to initiate, render, bill, [*32] or collect for telecommunication services. Instead, MCI plans on using this information for solicitation purposes only. This Court determines that release of CPNI without the customer's written or oral approval would undermine Congress's intent to protect customer privacy against aggressive marketing. See id. at 8089 [P 37].

Upon de novo review, the Court concludes that the PSC did not act contrary to the 1996 Act in failing to require BellSouth to provide MCI with customer service records. MCI is free to call a BellSouth customer and solicit his or her business without knowledge of that customer's records with BellSouth. Should MCI come across a customer unaware of the services to which he or she subscribes, MCI can obtain said information by instituting a three-way call. The PSC's decision to protect customer privacy in no way discriminates against MCI, nor does it harm competition between carriers.

VI. Performance Standards, Reporting Requirements, and an Enforcement Mechanism

The final contention set forth by MCI is the PSC's failure to include in the interconnection agreement, performance standards, reporting requirements, and an enforcement mechanism to prevent [*33] BellSouth from ignoring any substantive performance requirements without fear of any meaningful penalty such as for example, liquidated damages.

MCI claims that objective performance standards are needed to enable MCI to know with confidence how long BellSouth will take to provide a requested element so that MCI will be able to tell its potential customers how long it will take to provide the service they have ordered. MCI also claims that reporting requirements need to be implemented to ensure that BellSouth meets its statutory and contractual obligations to determine what level of service BellSouth is providing to itself and its competitors, and therefore whether MCI is receiving the level of quality to which it is entitled. Finally, MCI states that if the PSC does not set forth some type of enforcement mechanism in the interconnection agreement, BellSouth will be free to ignore any substantive performance requirements as it will suffer no meaningful penalty.

BellSouth argues that the aforementioned provisions are not mentioned anywhere in the Act and therefore are beyond the scope of the arbitration proceedings before the PSC. MCI counterargues that the FCC has indicated that [*34] proper performance measures are necessary for compliance with the Act. n10 According to MCI, the FCC did not set forth any specific requirements because it found state commissions to be in the best position to do so.

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n10 See In re Application of Ameritech Michigan Pursuant to @ 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan, Memorandum Opinion and Order, 12 FCC Rcd 20543 at P 204 (1997).

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This Court is leery to use 47 U.S.C. @ 252(c) which permits a state commission to resolve "any open issues and impose conditions upon the parties to the agreement" as a requirement that the PSC set performance standards, reporting requirements, and penalty provisions, as MCI suggests. Although a state commission may decide to impose such standards and mechanisms, this Court will not conclude that silence on the part of Congress implies that it is the duty of a state commission to include such provisions in an interconnection agreement. MCI's argument that the [*35] absence of said provisions was a violation of the Act by the PSC must fail.

CONCLUSION

This Court finds that MCI has presented some meritorious arguments and is entitled to limited relief. This Court determines that dark fiber is a UNE of which MCI is entitled to lease in a nondiscriminatory manner from BellSouth. Therefore, this Court will remand the dark fiber issue to the PSC for the purpose of determining a non-discriminatory time-frame in which MCI is required to use all dark fiber leased from BellSouth and a time frame in which BellSouth has a legitimate business purpose for withholding the lease of dark fiber for its own use. This Court also remands this matter to the PSC for the determination of the appropriate wholesale rate of CSAs between the parties. Finally, this Court overturns the PSC's decision to exclude from resale all short term promotions offered by BellSouth.

IT IS SO ORDERED.

This is the 11th day of March, 1999.

JOSEPH M. HOOD, JUDGE

ORIGINAL

MCIMETRO ACCESS TRANSMISSION SERVICES, INC., Plaintiff, v. GTE NORTHWEST, INC., et al., Defendants. MCIMETRO ACCESS TRANSMISSION SERVICES, INC., Plaintiff, v. GTE NORTHWEST, INC., et al., Defendants. GTE NORTHWEST, INC., Plaintiff, v. MCIMETRO ACCESS TRANSMISSION SERVICES, INC., et al., Defendants.

NO. C97-742WD, NO. C97-905WD, NO. C97-928WD

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE DIVISION

1998 U.S. Dist. LEXIS 11335

July 7, 1998, Decided
July 7, 1998, Filed, Entered

DISPOSITION: [*1] Summary judgment motions of WUTC, MCI, and GTE granted in part and denied in part. GTE's taking claim dismissed without prejudice. No party to recover costs.

COUNSEL: For MCIMETRO ACCESS TRANSMISSION SERVICES INC, plaintiff: James H Jordan, Jr, MILLER, NASH, WIENER, HAGER & CARLSEN, SEATTLE, WA. Donald B Verrilli, Jr, JENNER & BLOCK, WASHINGTON, DC.

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JUDGES: William L. Dwyer, United States District Judge.

OPINIONBY: William L. Dwyer

OPINION: ORDER ON MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

These three consolidated cases were brought by MCIMetro Access Transmission Services, Inc. ("MCI"), and GTE Northwest, Inc. ("GTE"), pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. @ 252(e)(6), for judicial review of an agreement (the "Agreement") approved by the Washington Utilities and Telecommunications Commission ("WUTC") concerning interconnection between MCI and GTE. MCI and GTE have sued each other and also have named the WUTC and its commissioners as defendants. The two MCI actions are identical; MCI filed the same complaint twice out of concern that the first complaint was not ripe.

Pursuant to the Act, entrants into a local telecommunications market may demand the following from an incumbent local exchange carrier ("LEC"): (1) interconnection with its local network; (2) access to its individual "network elements," such as routers and switches, "at cost"; and (3) at wholesale, rights to the services [*4] the incumbent LEC offers its customers at retail. 47 U.S.C. @ 251(c)(2)-(4). MCI is an entrant into a local telecommunications market. GTE is an incumbent local exchange carrier.

On April 3, 1996, MCI requested access negotiations with GTE. The Act requires both parties to negotiate in good faith. 47 U.S.C. @@ 251(c)(1), 252(a)(1). MCI and GTE conducted negotiations but were unable to reach an agreement.

On September 10, 1996, MCI requested arbitration as authorized by the Act. 47 U.S.C. @ 252(b)(1). The WUTC appointed an arbitrator. On December 3 and 4, 1996, MCI and GTE met before the arbitrator and filed their competing proposals. On January 3, 1997, the arbitrator issued a report and decision. On March 6, 1997, MCI submitted an interconnection agreement reflecting the arbitrator's decision (with some modifications). GTE stated that it "does not consent to this purported agreement." An interconnection agreement adopted by negotiation or arbitration is submitted for approval to the state commission. 47 U.S.C. @ 252(e)(1). That was done here. With some revisions, the WUTC approved the

MCI-GTE Agreement.

II. SCOPE AND STANDARD OF REVIEW

While the Act, at section 252(e)(6), [*5] authorizes judicial review of "the agreement," review necessarily extends to "the various decisions made by the [state commission] throughout the arbitration period which later became part of the agreement. . . ." GTE South, Inc. v. Morrison, 957 F. Supp. 800, 804 (E.D. Va. 1997).

As to the record to be reviewed, the Supreme Court has held that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 10 L. Ed. 2d 652, 83 S. Ct. 1409 (1963). Moreover, the Act was intended to facilitate the rapid entry of new competitors into local telecommunications markets. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997). That intent would be frustrated by the reception of new evidence in the reviewing court. Review is thus limited to the administrative record.

As to the standard of review to be applied, a state agency's interpretations of federal law are reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d [*6] 1491, 1495-96 (9th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). Chevron deference (see Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)), is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act. Questions of federal law will be reviewed de novo.

The WUTC's findings of fact are a different matter. Substantial deference should be afforded to a state commission's findings because the Act gives it original jurisdiction in the area of rate-setting. See 47 U.S.C. @ 252(c)(2). Principles of judicial discretion are strongest where the administrative body has primary jurisdiction over the precise matters the court is asked to decide. See Oregon v. Bureau of Land Management, 876 F.2d 1419, 1425 (9th Cir. 1989).

Iowa Utilities Board makes clear that the state commissions have original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating cost, as long as the terms of the Act are not violated. 120 F.3d at 794. The Eighth Circuit rejected an FCC order requiring state commissions to apply so-called TELRIC methodology [*7] to determine prices; the FCC may not "preempt any state pricing regulation that would employ a different methodology." Id. at 798, n.19.

The choice of pricing and cost methodology thus rests with the WUTC. Its determinations in those respects must be treated as fact findings and tested by the "arbitrary and capricious" standard of review. Under the Administrative Procedure Act (analogous here), that deferential standard requires that the court determine whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). The court may not substitute its judgment for that of the agency. Id.

III. SPECIFIC CLAIMS

All parties have moved for summary judgment. The materials filed, and the arguments of counsel heard on June 15, 1998, have been fully considered. Because there is no genuine issue of material fact for trial, the case may be decided on summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

Under the Agreement, when a court "with appropriate jurisdiction issues orders, [*8] which make unlawful any provision of this Agreement," the parties have an obligation to "amend the Agreement to substitute contract provisions which are consistent with such . . . orders." MCI-GTE Interconnection Agreement, Art. III at 15.

A. MCI's motion for summary judgment.

1. The WUTC did not act arbitrarily or capriciously by not computing rates separately for different population density zones. The Agreement contains rates for unbundled elements that are based on the statewide average of these varying costs. The Act contains no requirement that network element prices be deaveraged. See 47 U.S.C. @ 252(d)(1). It states that the just and reasonable rate for a network element shall be based on the "cost . . . of providing the . . . network element." Id. The WUTC reasonably computed rates for network elements on a uniform statewide basis.

2. The WUTC did not act arbitrarily or capriciously in requiring GTE to provide MCI interim number portability pursuant to its Washington tariff for that service. Number portability refers to the ability of customers to maintain the same telephone number when they change providers. In the Matter of Telephone Portability, [*9] 11 FCC Rcd 8352, CC Docket No. 95-116, FCC 96-286, at P 7 (July 2, 1996). The Act requires that costs of providing number portability shall be borne "on a competitively neutral basis." 47 U.S.C. @ 251(e)(2). MCI has not shown that using tariffs to govern compensation for interim number portability fails the "competitively neutral" test. In the Matter of Telephone Number Portability, CC Docket No. 95-116, "Third Report and Order" (rel. May 12, 1998), concerns long-term, not interim, number portability, and does not affect the outcome here. Nor has it been shown that the WUTC rate for interim number portability is discriminatory under the "nondiscriminatory access" requirement of 47 U.S.C. @ 251(b)(3).

3. The WUTC did not arbitrarily or capriciously base interim wholesale rates for GTE's volume-discounted services on GTE's non-volume-discounted retail rate less the volume or wholesale discount. The Act requires incumbent LECs to offer their services for resale at wholesale prices, i.e., the retail rate less avoided costs. 47 U.S.C. @ 252(d)(3). The WUTC arbitrator determined that when GTE sells services at volume, it avoids retail costs. The WUTC reasonably decided to treat [*10] the volume discount as an approximation of the costs avoided by a volume sale.

4. The WUTC unlawfully required mandatory binding arbitration "with respect to any controversy or claim arising out of or relating to this Agreement or its breach." The parties did not agree to arbitrate under the terms of the interconnection agreement, and the Act does not permit commissions to impose nonconsensual arbitration of claims arising out of or relating to interconnection agreements. Section 252(e) of the Act, which requires arbitration in adopting an interconnection agreement, is very different from

the proposed arbitration clause in the Agreement. The commission does not have the power to deprive nonconsenting parties of procedural rights afforded by law.

B. GTE's motion for summary judgment.

1. The WUTC did not arbitrarily or capriciously determine prices for unbundled elements and interconnection. The arbitrator calculated the "just and reasonable rate" by using GTE's replacement cost of providing facilities. The Act requires that the incumbent LEC provide interconnection access and network elements for a "just and reasonable rate" which is "based on the cost . . . of providing [*11] the interconnection or network element." 47 U.S.C. @ 252(d)(1). Section 251(d)(1) does not require that a "just and reasonable rate" be based on actual or historical costs.

2. The WUTC did not arbitrarily or capriciously determine wholesale rates. Under 47 U.S.C. @ 251(c)(4), GTE must offer to MCI for resale at wholesale rates any telecommunications service that GTE "provides at retail to subscribers who are not telecommunications carriers." A wholesale rate is determined on the basis of retail rates less "the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. @ 252(d)(3). The arbitrator adopted MCI's proposal that wholesale rates be set at a 16.63% discount from retail rates. This wholesale discount rate is lower than the FCC's recommended range of 17 to 25 percent. See 47 C.F.R. @ 51.611(b). The WUTC reasonably determined the wholesale discount by subtracting the costs that will be avoided by an economically efficient competitor selling at wholesale, rather than the costs which GTE will actually avoid. This determination was permissible under the Act.

3. The Agreement contravenes [*12] the Act by requiring GTE, the incumbent LEC, to provide network elements in any combination on a single order. The Eighth Circuit has held that an FCC rule violated section 251(c)(3) of the Act by requiring incumbent LECs to combine network elements for entrant LECs. Iowa Utilities v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). The court noted that "section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis." Iowa Utilities, 120 F.3d at 813. The Iowa Utilities court emphasized that compelled recombination would undermine the difference between wholesale prices for finished service and the "at-cost" price paid for network elements. Id.

4. The WUTC exceeded its authority under the Act in requiring GTE to provide MCI with a higher-than-standard level of access. The WUTC held that "if MCI requests a higher than standard level of access, GTE must accommodate the request to the extent that it is technically feasible. . . ." 47 U.S.C. @ 251(c)(2) requires an incumbent LEC to provide interconnection that is "at least equal in quality to that provided [*13] . . . to itself." Section 251(c)(3) imposes on incumbent LECs the duty to provide nondiscriminatory access to unbundled network elements. These sections do not obligate incumbent LECs to provide unbundled network elements of superior quality. The Eighth Circuit has struck down the FCC rules that obligated incumbent LECs to provide interconnections or unbundled network elements of superior quality. Iowa Utilities, 120 F.3d at 811-12.

5. The WUTC properly determined that "dark fiber" is a network element under 47 U.S.C. @ 251(c)(3). Dark fiber is cable which connects two parts of a

telephone network but is not electronically equipped for voice or data to pass through it. A "network element" includes a facility or equipment that is "used in the provision of a telecommunications service." 47 U.S.C. @ 153(29). There is no authority exactly on point. The arbitrator reasoned that "[while] there is no dispute that dark fiber is not currently being 'used' to provide service, the arbitrator finds that the statute should be broadly interpreted. The purpose of fiber is to be used to provide telecommunications service. . . Allowing access to dark fiber is comparable to allowing access [*14] to capacity on poles, conduits, or rights-of-way." The WUTC's decision on the point cannot be deemed arbitrary or capricious.

6. The Agreement correctly determined that dedicated and common transport is a network element under 47 U.S.C. @ 252(d)(1). The parties have defined common transport as "an interoffice transmission path between GTE Network Elements . . . shared by carriers." Dedicated transport is "an interoffice transmission path between MCIm designated locations to which MCI is granted exclusive use." The FCC considers transport trunks to be network elements. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio, 11 FCC Rcd 15499, CC Docket Nos. 96-98 and 95-185, P 262 (August 8, 1996).

7. GTE's public payphone services fall within the Act's resale provisions. Section 251(c)(4) requires incumbent LECs to offer for resale at wholesale rates any telecommunications service that the carrier provides "to subscribers who are not telecommunications carriers." Public payphone services are services that incumbent LECs provide to subscribers who are [*15] not telecommunications carriers.

8. The WUTC did not violate the Act in requiring GTE to provide customized routing of operator service and directory assistance. The WUTC requires customized routing in a particular switch, unless the incumbent LEC proves that such service as to a particular switch is not technically feasible. GTE has failed to show that customized routing is not technically feasible. 47 U.S.C. @ 251(c)(3) requires an incumbent LEC to provide access to network elements on an unbundled basis "at any technically feasible point. . . ."

9. The WUTC contravened the Act in requiring GTE to "expand its facilities or obtain additional space" pursuant to requests and by excusing GTE only when "there is no practical way of offering additional spaces." The Act requires incumbent LECs to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. . . ." 47 U.S.C. @ 251(c)(6) (emphasis added). The Agreement unlawfully expands GTE's obligation to provide physical collocation of equipment necessary for interconnection or access to unbundled network elements. The FCC has [*16] determined that "the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted." 47 C.F.R. @ 51.323(f)(1).

10. The Agreement properly requires GTE to provide MCI with access to poles, ducts, conduits and rights of way. Section 251(b)(4) requires all LECs "to afford access to the poles, ducts, conduits, and rights-of-way" to competing carriers "on rates, terms and conditions that are consistent with [non-discriminatory access]." The WUTC's decision is consistent with the FCC's order that utilities must "take all reasonable steps to accommodate requests

for access."

11. The WUTC properly rejected GTE's proposed limitation of liability provision. GTE and MCI both submitted interconnection agreements with limitation of liability provisions. The WUTC deleted both limitation of liability provisions from its order on the ground that "the parties had neither agreed on appropriate language nor had the issue been arbitrated." GTE's provision was properly rejected as broader than the issue arbitrated; it encompassed all liability, whether relating to MCI's "uncollectible or unbillable" revenues or [*17] not. The issue arbitrated was whether GTE would be financially responsible for MCI's uncollectible or unbillable revenues resulting from "work errors, software alterations, or unauthorized attachments to local loop facilities."

12. The WUTC did not violate the Act by relying on "final offer" arbitration. 47 U.S.C. @ 252(c) requires that the arbitrator decide the issues in a manner consistent with the Act and FCC Regulations. Here, the arbitrator chose final offer provisions that best complied with state and federal law and WUTC policy. If neither party had submitted a final offer that was consistent with the law, the arbitrator would have rejected both proposals and resolved the issue in accordance with state and federal law and WUTC policy. The use of modified "final offer" arbitration was consistent with due process, which requires "an opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). GTE submitted nearly 1200 pages of testimony and exhibits, filed a lengthy post-arbitration brief, and participated in two days of hearings before the arbitrator. Due process was afforded. [*18]

13. The WUTC properly deprived GTE of rural exemption status. See Second Supplemental Order, In the Matter of the Claim of GTE Northwest Inc. for Rural Telephone Exemption Pursuant to 47 U.S.C. @ 251, at 1 (Dec. 11, 1996) ("Rural Exemption Order"). The WUTC determined that GTE was estopped from asserting its claim to the exemption. On June 19, 1996, GTE notified the WUTC that it would claim the exemption but did not communicate this idea to the parties with whom it was negotiating. The WUTC found GTE's strategy to delay communicating its claim to the rural exemption "inconsistent with the incumbent's statutory duty to negotiate in good faith." See 47 U.S.C. @ 251(c)(1). GTE's failure to disclose its intentions prevented the new entrants from promptly pursuing their rights under 47 U.S.C. @ 251(f)(1)(B). Rural Exemption Order at 9.

14. GTE claims that the WUTC's approval of the agreement amounts to an unconstitutional taking. A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson [*19] Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). These requirements are not met here, and the taking claim, because it is not ripe, must be dismissed without prejudice.

IV. SUMMARY OF RULINGS

The summary judgment motions of WUTC, MCI, and GTE are granted in part and denied in part in the respects set forth above. GTE's taking claim must be dismissed without prejudice. As these rulings dispose of the case, judgment will be entered accordingly. No party will recover costs.

The clerk is directed to send copies of this order to all counsel of record.

Dated: July 7, 1998.

William L. Dwyer

United States District Judge

JUDGMENT

Following decision by the court, it is ordered and adjudged that:

1. MCI has judgment determining that the WUTC-approved interconnection agreement (the "Agreement") violated the Telecommunications Act of 1996 (the "Act") by requiring mandatory arbitration "with respect to any controversy or claim arising out of or relating to this Agreement."

2. GTE has judgment determining that the Agreement violated the Act by requiring GTE to provide network elements in any combination on a single order; by requiring [*20] GTE to provide MCI with a higher-than-standard level of access; and by requiring GTE to expand its facilities or obtain additional space upon request.

3. GTE's taking claim is dismissed without prejudice.

4. On all claims except those specified in paragraphs 1, 2, and 3 above, judgment is entered for the parties against whom the claims were asserted. Accordingly, WUTC has judgment on all claims except those specified above.

5. No party will recover taxable costs.

The clerk is directed to send copies of this judgment to all counsel of record.

Dated: July 7, 1998.

William L. Dwyer

United States District Judge